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STATEMENT OF JURISDICTION

Jurisdiction over this attorney discipline matter is established by Article 5, section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 1994.

STATEMENT OF FACTS

Procedural History

The Information was served on Respondent on December 6, 1999. Respondent's deposition was taken on March 3, 2000. [Please note: Many of the exhibits have two labels. The labels with the notation 3/3/00 are the labels from the deposition, which is Informant's Exhibit 3.] A hearing was held on August 3, 2000. The Disciplinary Hearing Panel issued its decision on March 14, 2001. The panel found that Respondent had engaged in professional misconduct by violating Rules 4-1.1, 4-8.4(c), 4-1.3, and 4-1.5(a). The panel recommended that Respondent be suspended for a period of ninety (90) days, that he be ordered to reimburse any contingency fees received from the medical payment portions of the Pringle and Holder recoveries, and that costs be taxed to Respondent. The parties did not concur.

General Facts

The facts set forth in this statement of facts are not in dispute. They are established by the Information and Answer. (Inf. Exh. 1 and 2)

Respondent was licensed as an attorney in Missouri on April 24, 1987. His bar number is 34576. His date of birth is September 4, 1957. His social security number is 497-66-1191. Respondent's license is currently in good standing.

Count I

Sandra Pringle Complaint, File #98-0417

On September 23, 1996, Sandra Pringle, her husband, Alvin Eugene Pringle, their minor son, Travis Pringle, and their son in-law, Daniel Marrow, were involved in an auto accident with an uninsured motorist. In September of 1996, Respondent was hired by Ms. Pringle to represent her and her family members in the personal injury matter.

Daniel Marrow

On March 14, 1997, American Family Insurance Group issued the following checks to Daniel Marrow and Respondent:

- Check #04434616 for $1,545.80 for Daniel Marrow's medical expense claim.
- Check #04434621 for $5,000.00 for Daniel Marrow's uninsured motorist claim.

Respondent deposited both checks, on March 20, 1997, in his checking account at Lawson Bank, account number of 011479 (Lawson account). On March 27, 1997, Respondent issued Check #4997 to Daniel Marrow for $2,441.67 from his Lawson account, which cleared on March 28, 1997. Respondent kept a contingent fee percentage of both, the check for the medical expense claim and the check for the uninsured motorist claim.

Respondent kept the funds for medical expenses in his Lawson account and was to pay Marrow's medical expenses.

Approximately 15 months later, on or about June 25, 1998, Respondent was sent a patient invoice from Dr. Sidney Cantrell for Daniel Marrow showing the account had no payment activity and an overdue balance of $310.00.

Respondent issued the following checks from his Lawson account for Daniel Marrow's medical costs dated July 1, 1998:

- Check #5599 for $494.00 to MAST Ambulance with memo notation "Daniel Marrow 9-23-96", which cleared on July 17, 1998.
- Check #5600 for $310.00 to Dr. Sidney Cantrell with memo notation "Daniel Marrow 9-23-96", which cleared on July 10, 1998.
- Check #5601 for $100.00 to Truman Medical Center with memo notation "Daniel Marrow 9-23-96", which cleared on July 15, 1998.

Travis Pringle

On March 14, 1997, American Family Insurance Group issued the following checks to "Albert and Sandra Pringle, individually & as parents & guardians of Travis Pringle, a minor;Timothy Tipton, Attny.":

- Check #G28126 for $776.90 for Travis Pringle's medical expense claim; and

- Check #G28127 for $3,500.00 for Travis Pringle's uninsured motorist claim.

On March 19, 1997, Travis Pringle, Sandra Pringle, and Albert Pringle signed the settlement

statement for Travis Pringle, which showed a total settlement of $4,276.90, less medical costs, expenses, and Respondent's attorney fees, resulting in a balance due to Travis Pringle in the amount of $1,869.12. Respondent deposited both checks, on

March 20, 1997, in his Lawson account.

On March 27, 1997, Respondent issued Check #4995 to Travis Pringle, Albert Pringle, and Sandra Pringle for $1,869.12 from his Lawson account, which cleared on March 28, 1997. Respondent kept the funds for medical expenses in his Lawson account and was to pay Travis Pringle's medical expenses. Respondent kept a contingent fee percentage of both, the check for the medical expense claim and the check for the uninsured motorist claim.

On June 25, 1998, Respondent was sent a patient invoice from Dr. Sidney Cantrell for Travis Pringle showing the account had no payment activity and an overdue balance of $35.00.

Respondent issued the following checks from his Lawson account for Travis Pringle's medical costs dated July 1, 1998:

- Check #5602 for $184.00 to Hospital Hill Health Services with memo notation "Travis Pringle 9-23-96", which cleared on July 13, 1998.
- Check #5603 for $194.20 to Dr. Sidney Cantrell with memo notation "Travis Pringle 9-23-96", which cleared on July 10, 1998.
- Check #5604 for $457.90 to MAST Ambulance with memo notation "Travis Pringle 9-23-96", which cleared on July 23, 1998.
- Check #5605 for $100.00 to Truman Medical Center with memo notation "Travis Pringle 9-23-96", which cleared on July 15, 1998.

Albert Pringle

On March 14, 1997, American Family Insurance Group issued the following checks to Albert Pringle and Respondent:

- Check #04434613 for $2,460.40 for Albert Pringle's medical expense claim.
- Check #04434620 for $10,500.00 for Albert Pringle's uninsured motorist claim.

On March 19, 1997, Albert Pringle signed his settlement statement, which showed a total settlement of $12,960.40, less medical costs, expenses, and Respondent's attorney fees, resulting in a balance due to Albert Pringle in the amount of $6,194.07. Respondent deposited both checks on March 20, 1997, in his Lawson account. On March 27, 1997, Respondent issued Check #4996 to Albert Pringle for $6,194.07 from his Lawson account, which cleared on March 28, 1997. Respondent kept the funds for medical expenses in his Lawson account and was to pay Albert Pringle's medical expenses. Respondent kept a contingent fee percentage of both, the check for the medical expense claim and the check for the uninsured motorist claim.

On June 25, 1998, Respondent was sent a patient invoice from Dr. Sidney Cantrell for Albert Pringle showing the account had no payment activity and an overdue balance of $385.00.

Respondent issued the following checks from his Lawson account for Albert Pringle's medical costs dated July 1, 1998:

- Check #5595 for $1,284.40 to Excelsior Springs Medical Center with memo notation "Albert Pringle 9-23-96", which cleared on July 9, 1998.
- Check #5596 for $385.00 to Dr. Sidney Cantrell with memo notation "Albert Pringle 9-23-96", which cleared on July 10, 1998.

- Check #5597 for $462.50 to MAST Ambulance with memo notation “Albert Pringle 9-23-96”, which cleared on July 22, 1998.

Sandra Pringle

On March 19, 1997, Sandra Pringle signed her first settlement statement, which showed a partial settlement of $4,775.00, and showed what her medical costs, expenses, and attorney’s fee were. On May 29, 1997, Sandra Pringle and Albert Pringle signed a Release and Trust Agreement.

On June 5, 1997, Sandra Pringle signed her second settlement statement, which showed a total settlement of $25,000.00, less medical costs, expenses, and Respondent's attorney fees, resulting in a balance due to Sandra Pringle in the amount of $11,406.75.

On June 5, 1997, Respondent issued Check #5088 to Sandra Pringle for $11,406.75 from his Lawson account and that check cleared on June 6, 1997. Respondent kept the funds for medical expenses in his Lawson account and was to pay Sandra Pringle's medical expenses.

On June 25, 1998, Respondent was sent a patient invoice from Dr. Sidney Cantrell for Sandra Pringle showing the account had no payment activity and an overdue balance of $510.00.

Respondent issued the following checks from his Lawson account for Sandra Pringle's medical costs:

- Check #5565 dated June 23, 1998, for $754.00 to Rehabilitation Services with memo notation "Pringle - #69637 9-23-96", which cleared on June 30, 1998.
- Check #5590 dated July 1, 1998, for $1,507.00 to Excelsior Springs Medical Center with memo notation "Sandra Pringle 9-23-96", which cleared on September 3, 1998.
- Check #5591 dated July 1, 1998, for $280.00 to Dr. Sidney Cantrell with memo notation "Sandra Pringle 9-23-96", which cleared on July 10, 1998.
- Check #5592 dated July 1, 1998, for $89.00 to Hospital Hill Health Services with memo notation "Sandra Pringle 9-23-96", which cleared on July 13, 1998.
- Check #5593 dated July 1, 1998, for $527.90 to MAST Ambulance with memo notation "Sandra Pringle 9-23-96", which cleared on July 24, 1998.

- Check #5594 dated July 1, 1998, for $142.00 to Truman Medical Center with memo notation “Sandra Pringle 9-23-96”, which cleared on July 15, 1998.
- Check #5620 dated July 8, 1998, for $230.00 to Dr. Sidney Cantrell with memo notation “Sandra Pringle”; which cleared on July 13, 1998.

Respondent issued the following check from his Missouri Federal Savings Bank checking account, account number 277712 (Federal account) for Sandra Pringle’s medical costs:

- Check #6120 dated August 27, 1998, for $273.04 to Excelsior Springs Medical Center with memo notation “Sandra Pringle 9-23-96”, which cleared on September 3, 1998. Respondent states that the medical expenses to Excelsior Springs Medical Center were for medical expenses not connected with the automobile accident of September 23, 1996.

Sandra Pringle sent Respondent a letter dated September 21, 1998, explaining that S.D. Waldman & Associates was still not paid, and she also requested copies of all of the signed settlement statements and all cancelled checks paid on their behalf within ten (10) working days. Respondent sent a letter to Sandra Pringle dated October 6, 1998, explaining that although his office paid a bill to Dr. Waldman’s office, there was another account that was unpaid and confirming that all medical bills have been paid.

Respondent issued the following check from his Federal account for Sandra Pringle’s medical costs:

- Check #6185 dated October 15, 1998, for $3,146.00 to S.D. Waldman & Associates, PA with memo notation “Sandra Pringle #20286 9-23-96”, which

cleared on October 20, 1998.

Respondent opened his Federal accounts, including account number 277712, in or about July of 1998. Neither the Lawson nor Federal accounts were trust accounts. Respondent did not have a trust account during the period he was handling these funds. Respondent never had a trust account in his private practice prior to the date he began handling these funds.

On November 3, 1998, Respondent agreed to provide the OCDC with the following records by November 16, 1998:

- Respondent's monthly bank statements from his Lawson account and Federal account for the period the Pringles' funds were deposited until the last funds were disbursed.
- A copy of each check that related to the Pringles' funds.
- A copy of each deposit slip that related to the Pringles' funds.

Respondent did not provide the requested records by November 16, 1998. On November 18, 1998, the OCDC requested that Respondent provide the records agreed upon on or before December 4, 1998. On November 30, 1998, Respondent provided the OCDC with a monthly bank statement dated March 31, 1997, from his Lawson account and copies of four checks issued in the Pringle matter. Informant ultimately obtained the records through a subpoena served on the bank.

Count II

Sherry Holder Complaint, File #98-0812

Holder met with Respondent in March of 1997 to discuss problems relating to her husband's disability claim. Respondent agreed to assist Holder with the matter.

Respondent also met with Holder in March of 1997, to discuss the issue of his representation of her for injuries she sustained in an automobile accident on February 13, 1996. During that meeting, Holder told Respondent that she was going to have back surgery because of an automobile accident that she had on February 13, 1996. Respondent states that when he left the meeting he advised Holder that he was not certain whether he would be willing to handle her personal injury claim arising from the February 13, 1996, accident. Respondent sent Holder a letter dated March 10, 1997, which stated that he would

be willing to handle her personal injury claim, relating to the February 13, 1996, accident, on a sixty-day contract.

Holder signed Respondent's sixty-day legal services contract on March 18, 1997. Respondent sent a letter to State Farm insurance on March 25, 1997, which stated that he represented Holder concerning the February 13, 1996, accident. Holder had back surgery on March 28, 1997, and then her spouse passed away within a month following her surgery. Respondent continued representing Holder after the sixty-day period.

On November 12, 1997, Holder signed her first settlement statement, which showed a settlement of medical expenses for $3,473.03, less Respondent's attorney fees, resulting in a balance due to Holder in the amount of $2,315.36. Respondent took a contingent fee percentage on Holder's medical expense claim. Respondent deposited the first settlement check for $3,473.03 into his Lawson account on November 13, 1997. Respondent agreed to pay Dr. Brian Kelling the $2,315.36 that was due to Holder for medical expenses.

Respondent sent a letter to Holder dated February 6, 1998, giving her an update on the status of her case.

Respondent issued Check #5444 for $2,315.36 to Kelling Chiropractic Center with memo notation "Date of Injury 2-13-96" from his Lawson account for Holder's medical costs on February 16, 1998.

Respondent opened his Federal accounts, including account number 277712, in or about July of 1998. Neither the Lawson nor Federal accounts were trust accounts. Respondent did not have a trust account during the period he was handling these funds. Respondent never had a trust account in his

private practice prior to the date he began handling these funds.

Holder sent Respondent a certified letter, with return receipt requested, dated June 9, 1998, which gave Respondent ten days to inform her of the status of her case, and she gave him an ultimatum to either get some results for her or she would fire him. Respondent's office signed for the certified letter on June 12, 1998. Respondent sent a letter to Holder dated June 12, 1998. The letter stated that he felt that they needed to continue to work together on her case, but she could dismiss him if she wanted to do so. Respondent also asked her in his letter to let him know if she wished to proceed. Holder contacted Respondent's office on approximately June 15, 1998, and told Angie, a member of Respondent's staff, that she wanted Respondent to go ahead with her case.

Respondent sent Holder a letter dated June 26, 1998, telling her that her file was transferred to a different insurance adjuster, and the new adjuster needed a week to review the file material.

State Farm Mutual Automobile Insurance Company issued a check for $50,000 to Holder and Respondent dated July 31, 1998. Respondent contacted Holder and told her that he had received the settlement check, and he would bring it to her home to be signed. Respondent came to Holder's home on August 5, 1998, with the settlement documents to be signed by Holder.

On August 5, 1998, Holder signed the second settlement statement, which showed a total settlement of $50,000.00, less expenses and Respondent's attorney fees, resulting in a balance due to Holder in the amount of $33,201.34. Respondent deposited the $50,000 check from State Farm into his Federal account on August 5, 1998.

Respondent issued a check to Holder on August 20, 1998, in the amount of $33,201.34.

POINTS RELIED ON

POINT I

RESPONDENT IS GUILTY OF PROFESSIONAL MISCONDUCT UNDER RULE 4-8.4(a), (c), AND (d) AS A RESULT OF VIOLATING:

A. RULE 4-1.7(b) BY USING THE FUNDS BELONGING TO HIS CLIENTS AND THIRD PARTIES FOR HIS OWN PURPOSES.

B. RULE 4-1.15 (a) BY FAILING TO:

(1) **HOLD THE PROPERTY OF HIS CLIENTS AND THE THIRD PARTY MEDICAL PROVIDERS SEPARATE FROM HIS OWN PROPERTY;**

(2) **SAFEGUARD THE PROPERTY OF HIS CLIENTS AND THIRD PARTY MEDICAL PROVIDERS, INCLUDING USING THE FUNDS BELONGING TO CLIENTS AND THIRD PARTIES FOR HIS OWN PURPOSES;**

(3) **KEEP THE FUNDS IN A SEPARATE ACCOUNT.**

C. RULE 4-1.15(b) BY FAILING TO:

(1) **PROMPTLY NOTIFY THE THIRD PARTY MEDICAL PROVIDERS THAT HE HAD THE FUNDS;**

(2) **PROMPTLY DELIVER TO THE THIRD PARTY MEDICAL PROVIDERS THE FUNDS THEY WERE**

ENTITLED TO RECEIVE.

D. RULE 4-1.3 BY FAILING TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN PAYING THE MEDICAL EXPENSES FOR HIS CLIENTS FOLLOWING THE SETTLEMENT OF THEIR CLAIMS.

E. RULE 4-1.4 BY FAILING TO COMMUNICATE TO HIS CLIENTS THAT HE HAD NOT PAID THEIR MEDICAL BILLS.

F. RULE 4-1.5(a) BY TAKING A CONTINGENT FEE ON THE CLIENTS' MEDICAL EXPENSE CLAIMS.

G. RULE 4-1.5(c) BY CONTINUING TO REPRESENT SHERRY HOLDER ON A CONTINGENT FEE BASIS, WHEN THE WRITTEN CONTINGENT FEE CONTRACT HAD EXPIRED.

H. RULE 4-8.1(b) BY FAILING TO RESPOND TO A LAWFUL DEMAND FOR INFORMATION FROM A DISCIPLINARY AUTHORITY, IN THAT, RESPONDENT FAILED TO PROVIDE DOCUMENTS AND EXPLANATIONS TO OCDC.

In re Staab, 785 S.W.2d 551 (Mo. banc 1990)

Rule 4-1.15(a)

Rule 4-1.7(b)

Rule 4-1.15(b)

Rule 4-1.3

Rule 4-1.4

Rule 4-1.5(a)

Rule 4-1.5(c)

Rule 4-8.1(b)

POINT II

THIS COURT SHOULD DISBAR RESPONDENT BECAUSE MISAPPROPRIATION AND COMMINGLING OF CLIENT FUNDS WARRANTS DISBARMENT AND THE AGGRAVATING AND MITIGATING FACTORS, TAKEN TOGETHER, DO NOT CHANGE THIS RESULT.

In re Williams, 711 S.W.2d 518 (Mo.banc 1986)

In re Schaeffer, 824 S.W.2d 1 (Mo. banc 1992)

In re Simmons, 576 S.W.2d 324 (Mo. banc 1978)

In re Snyder, 35 S.W.3d 380, 382 (Mo.banc 2000)

In re Witte, 615 S.W.2d 421 (Mo. banc 1981), cert den. 454 U.S. 1025, 102 S.Ct 559, 70 L.Ed.2d 469 (1981)

In re Mentrup, 665 S.W.2d 324 (Mo. banc 1984)

In re Griffey, 873 S.W.2d 600, 603 (Mo. banc 1994)

A.B.A. STANDARDS FOR IMPOSING LAWYER SANCTIONS

ARGUMENT

POINT I

RESPONDENT IS GUILTY OF PROFESSIONAL MISCONDUCT UNDER RULE 4-8.4(a), (c), AND (d) AS A RESULT OF VIOLATING:

A. RULE 4-1.7(b) BY USING THE FUNDS BELONGING TO HIS CLIENTS AND THIRD PARTIES FOR HIS OWN PURPOSES.

B. RULE 4-1.15 (a) BY FAILING TO:

(1) **HOLD THE PROPERTY OF HIS CLIENTS AND THE THIRD PARTY MEDICAL PROVIDERS SEPARATE FROM HIS OWN PROPERTY;**

(2) **SAFEGUARD THE PROPERTY OF HIS CLIENTS AND THIRD PARTY MEDICAL PROVIDERS, INCLUDING USING THE FUNDS BELONGING TO CLIENTS AND THIRD PARTIES FOR HIS OWN PURPOSES;**

(3) **KEEP THE FUNDS IN A SEPARATE ACCOUNT.**

C. RULE 4-1.15(b) BY FAILING TO:

(1) **PROMPTLY NOTIFY THE THIRD PARTY MEDICAL PROVIDERS THAT HE HAD THE FUNDS;**

(2) **PROMPTLY DELIVER TO THE THIRD PARTY MEDICAL PROVIDERS THE FUNDS THEY WERE**

ENTITLED TO RECEIVE.

D. RULE 4-1.3 BY FAILING TO ACT WITH REASONABLE DILIGENCE AND PROMPTNESS IN PAYING THE MEDICAL EXPENSES FOR HIS CLIENTS FOLLOWING THE SETTLEMENT OF THEIR CLAIMS.

E. RULE 4-1.4 BY FAILING TO COMMUNICATE TO HIS CLIENTS THAT HE HAD NOT PAID THEIR MEDICAL BILLS.

F. RULE 4-1.5(a) BY TAKING A CONTINGENT FEE ON THE CLIENTS' MEDICAL EXPENSE CLAIMS.

G. RULE 4-1.5(c) BY CONTINUING TO REPRESENT SHERRY HOLDER ON A CONTINGENT FEE BASIS, WHEN THE WRITTEN CONTINGENT FEE CONTRACT HAD EXPIRED.

H. RULE 4-8.1(b) BY FAILING TO RESPOND TO A LAWFUL DEMAND FOR INFORMATION FROM A DISCIPLINARY AUTHORITY, IN THAT, RESPONDENT FAILED TO PROVIDE DOCUMENTS AND EXPLANATIONS TO OCDC.

Commingling and Misappropriation

Respondent has admitted that he has engaged in professional misconduct (Tr. 129), but because he denied these allegations in his Answer (Inf. Exh. 2), his admissions are not sufficiently definite to eliminate the need to address this aspect of the case.

Respondent's most serious violations involve his handling of funds belonging to clients, third parties, or both. Respondent's Answer establishes that he deposited settlement funds that were intended for disbursement to clients and health care providers into his general office account, because he did not have a trust account. He also admits that he didn't keep track of automatic withdrawals and didn't reconcile his bank statements for about three years. (Inf. Exh. 3, pg. 48, l. 23-25)

Respondent's commingling of funds is clear. His misappropriation of funds is also clear, although he quarrels with the extent. He admits that, over a period of several years, he had $10,000 less in his general office account than he thought he had. (Inf. Exh. 3, pg. 48, l. 13-20) He has admitted that there were periods, while the client or third party funds were deposited in his operating account, that there were negative balances or balances less than the amount he should have had for the clients or third parties. (Tr. 16, l. 19-24)

Informant's Exhibits 33 and 34 were marked for identification. They are Informant's summaries of bank statements, Exhibit 25, and Respondent's Check Register, Exhibits 22 and 23. Exhibits 25, 22, and 23 were admitted into evidence. Exhibits 33 and 34 are a part of the record and show the running balances in the account based on the bank statements and Respondent's Check

Register, respectively. Both show that Respondent's account was in negative balance, or balance less than what he should have had deposited on his clients' behalf, much of the time while he was holding the funds. Exhibit 34, which is based on Respondent's Check Register, shows higher balances, but Respondent ultimately compromised with the bank and agreed that he was off by $10,000.

Respondent's commingling and misappropriation of funds violates Rules 4-1.15(a) and 4-1.7(b). He failed to hold the funds in a separate account. He failed to safeguard the funds and used the funds for his own purposes, in conflict with his clients' interests.

Failure to Notify and Pay

Respondent has produced no documentation of notifying the medical providers that he had funds to pay them, prior to paying them. He took over a year to pay the Pringle family's medical providers. He took three months to pay Ms. Holder's medical provider. He received $3,972 for medical providers for the Pringle family, other than Sandra, on March 20, 1997. He did not pay these providers until July 1, 1998. He received the last settlement for Sandra Pringle on June 5, 1997. He made the first payment, out of the total $6,948.94 to medical providers for Sandra Pringle, on June 23, 1998. He made the last payment for Sandra Pringle on October 15, 1998, after he had assured Ms. Pringle and OCDC that all bills had been paid. (Inf. Exh. 12 and 13/Dep. Exh. 9 and 10)

Respondent received the last settlement for Sherry Holder on November 13, 1997. He did not pay Ms. Holder's medical provider the $2,315.36 until February 16, 1998. He claimed that Ms. Holder instructed him not to pay that bill. (Inf. Exh. 3, pg. 73, l. 25 – pg. 75, l. 4) However, Ms. Holder's testimony clearly refutes that claim. Part of her frustration with Respondent's representation was that she was anxious to get money from the insurance company to pay that bill. (Tr. 21, l. 2 – 22, l. 11)

Respondent's failure to make these payments in a timely manner violates Rules 4-1.15(b) and 4-1.3. His assurance that the bills had been paid, when some had not, violates Rule 4-1.4.

Contingent Fee on Medical Expense Payments

Respondent admits that he took a contingent fee on the medical expense payments for the Pringle family and Ms. Holder. Although he was asked to show that his efforts in collecting these payments involved anything other than making the claim by providing the medical records, he was unable to do so. Under the factors set forth in Rule 4-1.5(a), Respondent's contingent fee on the medical expense claims was unreasonable. The claims took very little skill or time. It was only a matter of getting all of the medical information to the insurance company. (Inf. Exh. 3, pg. 57, l. 14 – pg. 60, l. 12 and pg. 61, l. 22 – pg. 62, l. 19 and pg. 80, l. 7 – pg. 85, l. 2; Inf. Exh. 21/Dep. Exh. 19)

Continued Representation Without a Written Contingent Fee Contract

The Legal Service Contract between Respondent and Ms. Holder is, on its face, a contingency fee contract. It further states, two lines above Ms. Holder's signature: "I further agree that this is a sixty (60) day contract, commencing the 18th day of March , 1997." (Inf. Exh. 16/Dep. Exh 13) Respondent admits that he had nothing in writing extending the contract after the initial sixty-day period. (Inf. Exh. 3, pg. 68, l. 16-21) Respondent's continued representation of Ms. Holder on a contingency fee basis, without a written contract, violated Rule 4-1.5(c).

Failure to Provide Documents to OCDC

After meeting with Respondent, on November 3, 1998, and obtaining some documents, Respondent received a letter from OCDC dated November 18, 1998, outlining the documents Respondent had agreed to provide by November 16, 1998, but had not provided. Those documents were:

1. Monthly bank statements for Lawson Bank and Missouri Federal for the period the Pringles' funds were deposited, until the last funds were disbursed.
2. A copy of each check that related to the Pringles' funds.
3. A copy of each deposit slip that related to the Pringles' funds.

Respondent was also asked to provide any additional explanation necessary to understand the exact location and distribution of the funds.

With a cover letter dated November 25, 1998, Respondent sent a copy of the bank statement

for his Lawson account for the period ending 3-31-97. He also sent a copy of four of the checks related to the Pringles. He said he would provide the additional copies as soon as he was able to locate them. Respondent received a response from OCDC dated December 8, 1998, indicating that such an open ended time for providing the documents was not acceptable and setting a date of December 28, 1998. Respondent has no documentation of further communication with OCDC, until his counsel wrote to OCDC on February 11, 1999, indicating that he believed Respondent had complied with all requests for information, but also indicating awareness that OCDC had subpoenaed the bank records from the banks. Respondent's counsel requested a copy of Respondent's bank records from OCDC. Respondent's counsel received a response from OCDC, dated March 2, 1999, indicating that Respondent had not complied with all requests for information. (Inf. Exh. 14/Dep. Exh. 11)

In his deposition, Respondent claimed that he had complied with the requests for documents by sending Deposition Exhibit 17 (also Inf. Exh. 20). (Inf. Exh. 3, pg. 32, l. 24 – pg. 37, l. 2 and pg. 60, l. 23 – pg. 61, l. 12 and pg. 62, l. 23 – pg. 66, l. 25) Respondent's assertion that he provided these documents to OCDC is not credible in light of the lack of any supporting cover letter or other correspondence. Even if he did provide these documents, a quick comparison of the documents Respondent claims he provided (Inf. Exh. 20/Dep. Exh. 17) with the bank statements obtained from the bank (Inf. Exh. 25) shows that Respondent did not provide complete copies of all of the bank statements. Respondent did not provide the bank statement for the period 4-30-97 to 5-31-97. He did not provide all pages of the bank statements for Lawson Bank. Additionally, Respondent failed to provide the other documents and information requested in the letter of November 18, 1998.

Respondent's failure to provide the requested documents and information violates Rule 4-

8.1(b) by failing to respond to a lawful demand for information from a disciplinary authority. In *In re Staab*, 785 S.W.2d 551 (Mo. banc 1990), a case similar to the instant case, this Court found that Respondent's failure to provide requested bank records factored into the totality of the circumstances warranting disbarment.

POINT II

THIS COURT SHOULD DISBAR RESPONDENT BECAUSE MISAPPROPRIATION AND COMMINGLING OF CLIENT FUNDS WARRANTS DISBARMENT AND THE AGGRAVATING AND MITIGATING FACTORS, TAKEN TOGETHER, DO NOT CHANGE THIS RESULT.

The Disciplinary Hearing Panel recommended a ninety (90) day suspension. The DHP's findings of fact, conclusions of law, and recommendations are advisory. *In re Snyder*, 35 S.W.3d 380, 382 (Mo.banc 2000). The recommendation of the DHP is contrary to this Court's precedent and the evidence.

Even if Respondent had not converted client funds, by failing to have a trust account and depositing client funds and funds of third parties into his operating account, Respondent's commingling of client funds with general law office funds warrants disbarment. Respondent did not have a trust account, therefore, all funds of clients and third parties were commingled with his funds. This Court's precedent establishes that commingling of client funds with those of the attorney is grounds for disbarment. *In re Witte*, 615 S.W.2d 421 (Mo. banc 1981), cert den. 454 U.S. 1025, 102 S.Ct. 559, 70 L.Ed.2d 469 (1981).

Conversion of client funds, which often follows on the heels of commingling, is always a basis for disbarment. *In re Mentrup*, 665 S.W.2d 324 (Mo. banc 1984); A.B.A. Standard 4.1. "Where conversion of a client's money is involved, disbarment is the appropriate remedy. See Matter of Mendell, 693 S.W.2d 76 (Mo. banc 1985). Even an unintentional mishandling of client funds by an

attorney can justify disbarment. See In re Williams, 711 S.W.2d 518, 522 (Mo. banc 1986)." *In re Griffey*, 873 S.W.2d 600, 603 (Mo. banc 1994).

This Court disbarred the attorney in *In re Schaeffer*, 824 S.W.2d 1 (Mo. banc 1992) for conduct similar to Respondent Tipton's conduct. In the Cowell Matter, Schaeffer settled a malpractice case against a hospital. The client endorsed the settlement check, and Schaeffer directed that it be deposited in his general account. The check was never deposited into a trust or escrow account. During the period Schaeffer held the funds in his general account, the balance in the general account dropped below the $3000 held for the client on nineteen occasions. After learning of the client's complaint, Schaeffer deposited the client's portion of the settlement into his escrow account. The funds came from monies paid by another client.

In ordering Schaeffer disbarred, this Court stated at 5:

> When an attorney deposits the client's funds into an account used by the attorney for his own purposes, any disbursement from the account for purposes other than those of the client's interests has all the characteristics of misappropriation, particularly when the disbursement reduces the balance of the account to an amount less than the amount of the funds being held by the attorney for the client. Misappropriation of a client's funds, entrusted to an attorney's care, is always grounds for disbarment. In re Mentrup, 665 S.W.2d 324, 325 (Mo. banc 1984). Restitution of converted funds is not a defense. Id. Respondent's failure to preserve the client's funds undiminished in an escrow account

> constitutes a most serious violation of the disciplinary rules in an area where those rules properly demand procedures that not only guarantee that the client's funds will not be misappropriated but also enable the attorney readily to demonstrate that no misappropriation has occurred.
>
> In defense, respondent makes much of the fact that he exercised poor office practices and maintained a very heavy caseload, as well as the fact that the client did not affirmatively demand payment. These facts do not serve to mitigate when it is clear that respondent himself directed that the client's monies be deposited into respondent's business account, that respondent then withdrew from that account his own fee, and that on nineteen separate occasions between deposit of the check into the business account and payment to the client of the $3,000 owed to her, the balance in the business account dropped below $3,000.

In *In re Simmons*, 576 S.W.2d 324 (Mo. banc 1978), a case with facts similar to the one *sub judice*, this Court disbarred the Respondent attorney. In *Simmons*, the attorney made a $58,000 recovery for his clients, from which he retained $19,370 for his fee, and $9,573 for expenses. One of the expenses included in the $9,573 was a hospital bill for $3,429. Respondent did not pay the hospital bill. In the disciplinary proceeding, he propounded the excuse that the clients owed him fees for other work and that the hospital should pay him a fee

as well. This Court disbarred Simmons, noting the Master that Simmons' retention of the money was in direct violation of his promise to his clients to pay the bill.

Respondent's misappropriation of funds was "knowing" and should result in disbarment under ABA Standard 4.1:

> Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

The commentary under 4.12 states: Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion.

The hearing panel's finding that Respondent's misconduct was inadvertent is contrary to the weight of the evidence. Respondent does not dispute that he:

- *knew* that he did not have a trust account.
- *knew* that he deposited funds belonging to clients and third parties into his operating account.
- *knew* that he was not keeping track of automatic withdrawals or reconciling his bank accounts. (Inf. Exh. 3, pg. 48, l. 23-25)

Respondent does dispute whether he *knew* that the health care providers had not been paid. He claims that he did not know that they had not been paid, but he had all of the information that showed they had not been paid. He had documentation of the bills. (Inf Exhs. 5, 6 and7/Dep. Exh. 2, 3 and 4) Since

they had not, in fact, been paid, he had a lack of documentation in his records to show that payment had been made. He had past due bills and phone calls, in April of 1998, bringing it to his attention that they had not been paid. (Tr. pg. 39, l.18 – pg. 41, l. 3; Inf. Exh. 10/Dep. Exh. 7) His secretary prepared letters to go with some of the checks on May 6, 1998, but the checks were not written until July, because the correspondence got covered up on his desk. (Inf. Exh. 3, pgs. 29-31) Respondent was aware that these bills had been turned over for collection, when this further delay occurred. (Inf. Exh. 10/Dep. Exh. 7) His choice to ignore all of that information should not be equated with a lack of knowledge.

Respondent's argument that his actions were unintentional or inadvertent must fail, as did similar arguments in *In re Williams*, 711 S.W.2d 518 (Mo.banc 1986). In that case, unlike the instant case, Williams actually had a trust account. However, Williams had entrusted the responsibility for the trust account to his wife/bookkeeper. He had ignored the fact that the trust account was in disarray and that checks drawn on the trust account were returned for insufficient funds. "We cannot allow an attorney to escape ultimate responsibility for mishandling of a client's funds where he knowingly and intentionally ignores trust account problems and demonstrates an almost total disregard for the protection of those funds. Certainly where an attorney misappropriates a client's funds, protection of the public is uppermost in our minds and disbarment is generally appropriate in such cases." *Williams* at 522. "The fundamental purpose of an attorney disciplinary proceeding is to 'protect the public and maintain the integrity of the legal profession.' In re Waldron, 790 S.W.2d 456, 457 (Mo.banc 1990)." *In re Snyder*, at 384

<u>Aggravating Factors</u>

Respondent has committed numerous violations of the Rules of Professional Conduct. Some of the violations, other than commingling and misappropriation, may warrant suspension. Some, taken on their own, would warrant discipline less than suspension. The fact that Respondent has committed numerous other violations, some of which reflect a pattern of misconduct, should be considered in aggravation, under ABA Standard 9.22(c) and (d). Respondent's dishonest or selfish motive in using his clients' funds is an aggravating factor under ABA Standard 9.22(b). Respondent's substantial experience in the practice of law should be considered an aggravating factor under ABA Standard 9.22(i). Respondent was admitted in 1987 and had been in solo practice for approximately eight years, when these violations began. (Inf. Exh. 3, pg. 7)

Mitigating Factor

The only mitigating factor that applies in this case is Respondent's absence of prior discipline. Lack of prior discipline is considered a mitigating factor under ABA Standard 9.32(a).

CONCLUSION

Respondent's commingling and misappropriation of funds held on behalf of clients warrants disbarment, by itself. Respondent knew the funds were not in a trust account and knew that he was not, otherwise, taking appropriate steps to protect those funds. His violations were knowing. The dishonest or selfish motive, multiple other violations, pattern of misconduct, and experience in the practice of law are aggravating factors that reinforce disbarment as the appropriate discipline. Respondent's lack of prior discipline is only a mild mitigating factor, in light of the seriousness of his misconduct. In fact, based upon his testimony that he had never had a trust account prior to investigation of these

complaints, his lack of prior discipline was probably purely fortuitous.

This Court should disbar Respondent and assess costs against Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of Informant's Brief have been sent by First Class mail on this _____ day of June, 2001 to:

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_____
Sara Rittman

CERTIFICATION: SPECIAL RULE NO. 1(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Special Rule No. 1(b);

3. Contains 6,627 words, according to Microsoft Word 97, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sara Rittman